August 2003

Update: Child Protective Proceedings Benchbook

CHAPTER 9

Pretrial Proceedings

9.12 Required Procedures for Establishing Paternity

A. Definition of "Father"

Insert the following case summary after the first bulleted item on page 9-10:

In *In re CAW,* ___ Mich ___ (2003), the Michigan Supreme Court reversed the Court of Appeals' decision* that a putative father has standing to intervene in a child protective proceeding under the Juvenile Code where the child involved has a legal father. *In re CAW* involved a married couple, Deborah Weber and Robert Rivard, and their children. In July 1998, a petition alleging abuse and neglect was filed pursuant to MCL 712A.2(b). The petition stated that Rivard was the legal father of the children but might not be the biological father of "any or all of the children." The petition also indicated that Larry Heier was the biological father of one of Weber and Rivard's children, CAW. The trial court published a notice of hearing to Heier, but he did not attend any hearings. Later Rivard and Weber indicated that Rivard was the father of all of the children. The trial court then deleted all references to Heier contained in the petition. In November 2000, Weber and Rivard's parental rights to CAW were terminated. Heier then filed a motion in the trial court seeking to intervene in the child protective proceedings. Heier alleged that he was the biological father and had standing on that basis. The lower court denied Heier's motion. *CAW, supra* at ___. The Court of Appeals reversed.

*See the *Child Protective Proceedings Benchbook* Update for December 2002 for more information on the Court of Appeals' decision in *In re CAW,* 253 Mich App 629 (2002).

The Supreme Court held that Heier did not have standing to intervene in the child protective proceedings. *Id.* at ___. The Court indicated that intervention in such a proceeding is controlled by MCR 5.921(D),* which provided, in part, that a putative father is entitled to participate only "[i]f, at any time during the pendency of a proceeding, the court determines that the minor has no father as defined in MCR 5.903(A)(4). . . ." MCR 5.903(A)(4) defined a "father" as "a man married to the mother at any time from a minor's conception to the minor's birth unless the minor is determined to be a child

*MCR 5.921 was amended on May 1, 2003. See MCR 3.921(C).

born out of wedlock . . . .” MCR 5.903(A)(1) defined a “child born out of wedlock” as a child conceived and born to a woman who is unmarried from the conception to the birth of the child, or a child determined by judicial notice or otherwise to have been conceived or born during a marriage but who is not the issue of the marriage. Because Weber and Rivard were married during the gestation period, CAW was not “born out of wedlock.” No finding had ever been made that CAW was not the issue of the marriage, and the termination of Rivard’s parental rights was not a determination that CAW was not the issue of the marriage. Therefore, the requirements of MCR 5.903 were not met, and Heier did not have standing. The Court also stated the following regarding the policy underlying the applicable rules:

> “Finally, in the Court of Appeals opinion, as well as the dissent, there is much angst about the perceived unfairness of not allowing Heier the opportunity to establish paternity. We are more comfortable with the law as currently written. There is much that benefits society and, in particular, the children of our state, by a legal regime that presumes the legitimacy of children born during a marriage. See *Serafin v Serafin*, 401 Mich 629, 636; 258 NW2d 461 (1977). It is likely that these values, rather than failure to consider the plight of putative fathers who wish to invade marriages to assert paternity claims, motivated the drafters of the rules and statutes under consideration.” *CAW, supra* at ___.

Justice Weaver concurred with the result of the majority’s opinion but provided different reasoning. Justice Weaver indicated that the definition of “child born out of wedlock” in MCR 5.903(A)(1) varied from the definition in the Paternity Act only in the additional provision in MCR 5.903(A)(1) that paternity could be determined “by judicial notice or otherwise.” However, the additional provision does not affect when the determination that the child is not an issue of the marriage must be made in order to permit standing. Pursuant to *Girard v Wagenmaker,* 473 Mich 231, 242-243 (1991), in order to establish paternity under the Paternity Act of a child born while the mother was legally married to another man, there must be a prior court determination that the mother’s husband is not the father. Justice Weaver stated the following:

> “The provision [in MCR 5.903] that the determination may be made by judicial notice does not affect when the determination must be made in order to permit standing. Moreover, the use of the past tense makes even clearer the fact that the determination must be made by the court before a putative father may be accorded standing in a child protective proceeding. Because Weber was married to Rivard from the time of conception to the birth of CAW, and because CAW was not ‘determined by judicial notice or otherwise to have been conceived or born during a marriage but . . . not the issue of that marriage’ pursuant to MCR 5.903(A)(1), the provisions for notice to a putative father in MCR 5.921(D) were not applicable.” (Footnotes omitted.) *CAW, supra* at ___.

Justice Kelly wrote separately, concurring in part and dissenting in part. Justice Kelly agreed with the result reached by the majority but disagreed with the majority's reliance on MCR 5.921(D) and the policy underlying the Paternity Act. Justice Kelly indicated that MCR 5.921 does not explicitly address standing to intervene: it designates the persons who must be given notice before a child protective proceeding can go forward. MCR 5.901, which prescribes the court rules that apply to child protective proceedings, does not include a rule that permits intervention in a child protective proceeding. Therefore, Justice Kelly would hold that Mr. Heier could not identify a court rule under which he could intervene and, as a consequence, the trial court was required to deny his motion. *CAW, supra* at ___.

In regards to public policy, Justice Kelly stated the following:

> "I do not agree that the presumption of legitimacy rule has persuasive force in this case. Certainly, the majority would not advance the argument that this rule protects the sanctity of CAW's family unit. That proposition is absurd in the context of termination proceedings, the object of which is to destroy any familial bond between a child and the parent whose rights are being terminated.
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> Similarly, the policy cannot be advanced on the basis that it furthers the goals expressed in the juvenile code. Rigid application of the presumption of legitimacy would frustrate the code's preference for placing a child with his parent, if the parent is willing and able to care for him." *Id.* at ___.

Justice Kelly urged that the court rules be amended to allow a putative father the right to intervene in a child protective proceeding if he is able to raise a legitimate question about paternity. *Id*. at ___.

Dissenting, Justice Cavanagh argued that the Legislature intended to allow putative fathers an opportunity to intervene in child protective proceedings. Justice Cavanagh stated:

> "[N]othing in our statutes or court rules compels the conclusion that a putative father must first establish paternity in a separate legal proceeding. To so hold perpetuates the errors caused by the majority's position in *Girard* [*v Wagenmaker* 437 Mich 231 (1991)], while denying parents the right to develop and maintain relationships with their children." *CAW, supra* at ___.

The dissent also indicated that the courts making paternity and custody determinations have the authority to inquire about a child's putative father or parent in fact in order to ensure a child's best interests and due process rights are protected. *Id.* at ___.

CHAPTER 22

Family Division Records

22.2 Records of Family Division

Insert the following language after the last paragraph on page 22-1:

In *In re Lapeer County Clerk*, ___ Mich ___, ___ (2003), the Lapeer County Clerk filed a complaint requesting superintending control based upon a Lapeer Circuit Court Local Administrative Order that assigned duties of the county clerk to the staff of the Family Division of the Circuit Court. The Michigan Supreme Court dismissed the complaint for superintending control but, under its authority to prescribe rules of practice and procedure, provided guidance for courts in crafting future administrative orders.

The Michigan Supreme Court found that the clerk of the court *must* have care and custody of the court records and must perform ministerial duties that are noncustodial as required by the court. In regards to the clerk's custodial duties, the Michigan Supreme Court stated:

> "[W]e conclude that the clerk has a constitutional obligation to have the care and custody of the circuit court's records and that the circuit court may not abrogate this authority. See *In the Matter of Head Notes to the Opinions of the Supreme Court*, 43 Mich 640, 643; 8 NW 552 (1880) ('the essential duties [of a constitutional officer] cannot be taken away, as this in effect would result in the abolishment of the office . . .').
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> * * *
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> The circuit court clerk's role of having the care and custody of the records must not be confused with *ownership* of the records. As custodian, the circuit court clerk takes care of the records for the circuit court, which owns the records. Nothing in the constitutional custodial function gives the circuit court clerk independent ownership authority over court records. Accordingly, the clerk must make those records available to their owner, the circuit court. The clerk is also obligated to make the records available to members of the public when appropriate." *Lapeer County Clerk, supra* at ___. (Emphasis in original.)

The Court stated the following in regards to the noncustodial ministerial function of the clerk:

> "[W]e hold that prescribing the exact nature of a clerk's noncustodial ministerial functions is a matter of practice and procedure in the administration of the courts. Accordingly, the

authority to prescribe the specific noncustodial ministerial duties of the clerk of the circuit court lies exclusively with the Supreme Court under Const 1963, art 6, §5.

As such, the judiciary is vested with the constitutional authority to direct the circuit court clerk to perform noncustodial ministerial duties pertaining to court administration as the Court sees fit. This authority includes the discretion to create duties, abolish duties, or divide duties between the clerk and other court personnel, as well as the right to dictate the scope and form of the performance of such noncustodial ministerial duties." *Lapeer County Clerk, supra* at ___.